Union Free School District, 508 U.S. 384 (1993), require a conclusion that the censorship was viewpoint discrimination. Had Judge Black's view on this point prevailed, the court below would have ruled in favor of the Petitioner because it also determined that viewpoint discrimination is not allowed, even if the speech involved is deemed "school-sponsored" speech under the decision in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988). (A-12).

Selective censorship of religious messages is certainly viewpoint discrimination under this Court's precedent. In *Rosenberger*, 515 U.S. at 829, this Court wrote that "viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger* found such discrimination inherent in a University rule that denied funding to student publications that were written from a religious editorial perspective. The decision rejected the argument that the rule barred funding of any speech on religion and so was an allowable "content-based" restriction. *Id.* at 831-32.

In concluding that the censorship of the murals was an allowable content-based restriction on speech, the Court of Appeals did not even consider this Court's most recent decision on viewpoint discrimination in this context, *Good News Club v. Milford Central Schools*, 533 U.S. 98, 106-07 (1999). *Good News* held that the free speech rights of a Christian organization were violated by a school's refusal to allow the organization to hold meetings in the school pursuant to a policy which opened the school for use by civic and social groups. Significantly, the district court in

that case had held that the organization's rights had not been violated because its meetings were decidedly religious in nature "and not merely a discussion of secular matters from a religious perspective[.]" *Good News Club*, 533 U.S. at 104-05. Reversing the judgment of the district court and the court of appeals, this Court pointed out that the important point was not that there was some discrete secular issue to be discussed by the club, but that the club's meetings were an activity that fell within the purposes for which the school had been opened. That purpose was to allow civic groups to conduct events "pertaining to the welfare of the community." *Id.* at 108. Because it was clear that the club taught moral and character development to children, it qualified under the policy for use of the school and could not be excluded from the school because of the religious subject-matter of its meetings.

This Court went on to reject the lower courts' conclusions that excluding the club from the forum was justified because of the "quintessentially religious" nature of the club and made clear that such exclusion was unconstitutional viewpoint discrimination, writing as follows:

> We disagree that something that is "quintessentially religious" or "decidedly religious in nature" cannot also be characterized properly as the teaching of morals and character development from a particular viewpoint.... What matters for purposes of the Free Speech Clause is that we can see no logical difference in kind between the invocation of Christianity by the Club and the invocation of teamwork, loyalty, or

> patriotism by other associations to provide a foundation for their lessons. It is apparent that the unstated principle of the Court of Appeals' reasoning is its conclusion that any time religious instruction and prayer are used to discuss morals and character, the discussion is simply not a "pure" discussion of those issues. According to the Court of Appeals, reliance on Christian principles taints moral and character instruction in a way that other foundations for thought or viewpoints do not. We, however, have never reached such a conclusion. Instead, we reaffirm our holdings in *Lamb's Chapel* and *Rosenberger* that speech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint.

Id. at 111-12.

The Court of Appeals' conclusion that the censorship of Sharah's murals did not constitute viewpoint discrimination relied upon the very arguments rejected in *Good News Club* and *Rosenberger*. The decision below held that the Respondents engaged in permissible content-based regulation of expression because all religious speech was prohibited and the mural did not involve expression on a secular topic from a religious viewpoint (A-14, -15). But the murals painted by Sharah were appropriate to and satisfied the purpose of the mural project, which was beautification of the unsightly wood panels and individual expression by students. The murals were censored by the Respondents

because the beautification and expression were from a religious viewpoint. Simply because all religious expression was forbidden does not make the restriction any less a restriction based upon viewpoint, as is made clear by the *Good News* and *Rosenberger* decisions.

To support its holding that the censorship here was content-based, the Court of Appeals relied upon a portion of the *Rosenberger* opinion, 515 U.S. at 831, in which the majority noted that "the University does not exclude religion as a subject matter but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints." From this, the Court of Appeals reasoned that a total restriction on expression addressing religion would not be viewpoint discrimination. But this Court disavowed that very conclusion in *Good News*, 533 U.S. at 110, writing that "[a]lthough in *Rosenberger* there was no prohibition on religion as a subject matter, our holding did not rely on this factor" in finding that there was viewpoint discrimination.

The panel's reasoning that there was no viewpoint discrimination because the murals did not involve discussion of a secular topic conflicts with the holding in *Good News Club*, a decision which is not addressed in the Court of Appeals' decision. *Good News Club* found viewpoint discrimination, even though no discrete secular topic was opened for discussion. Similarly, Sharah's murals addressed the subject of the mural project established by the school. The censorship of those murals because of their religious content constituted regulation of expression based on "the specific motivating ideology or opinion or perspective of the speaker [.]" *Rosenberger*, 515 U.S. at 829. This is patent discrimination forbidden by this Court's decisions culminating in *Good News Club*.

Viewpoint discrimination is clearly a violation of the First Amendment when it occurs in a public forum. However, the Courts of Appeal are split on whether viewpoint discrimination is allowed where the expression constitutes school-sponsored speech. Compare *Fleming v. Jefferson County School District*, 298 F.3d 918 (10th Cir. 2002), *C.H. ex rel. Z.H. v. Oliva*, 195 F.3d 167 (3d Cir. 2003), *affirmed on other grounds*, 226 F.3d 198 (3d Cir. 2000) (en banc), *cert. denied, Hood v. Milford Township Board of Education*, 533 U.S. 915 (2001), with *Downs v. Los Angeles Unified Sch. Dist.*, 228 F.3d 1003 (9th Cir. 2000), *cert. denied*, 532 U.S. 994 (2001), and *Kincaid v. Gibson*, 191 F.3d 719 (6th Cir. 1999). That split is illustrated by the division among the panel of the Eleventh Circuit that decided this case, as Judge Black's concurrence argued that viewpoint discrimination is allowed in the case of school-sponsored speech (A-22). This concurrence conflicts with a decision from the Eleventh Circuit, *Searcy v. Harris*, 888 F.2d 1314, 1319 n. 7 (11th Cir. 1989), which held that *Hazelwood* did not intend "to drastically rewrite First Amendment law to allow a school official to discriminate based on a speaker's views[.]"

The instant petition for a writ of certiorari should be granted to remove any confusion and make plain that viewpoint discrimination is prohibited by the First Amendment, even if the speech is considered school-sponsored speech under the guidelines of *Hazelwood*. *Hazelwood* itself surely does not condone viewpoint discrimination; that decision never indicates that schools can censor on the basis of viewpoint. As noted in *Searcy*, 888 F.2d at 1324-25 (citing *Cornelius v. NAACP Legal Defense Fund*, 473 U.S. 788, 812-13 (1985)), *Hazelwood* does not offer any justification for allowing educators to discriminate on

the basis of viewpoint. "The prohibition against viewpoint discrimination is firmly embedded in first amendment analysis.... Without more explicit direction we will continue to require school officials to make decisions relating to speech which are viewpoint neutral."

The bar on viewpoint discrimination also is implicit in the *Rosenberberger* decision. The university argued there that, under *Widmar v. Vincent*, 454 U.S. 263 (1981), it was entitled to make content-based determinations on how it allocates resources through funding because the subsidized speech was that of the university. While this Court conceded that a university may make content-based distinctions when it is speaking for itself or subsidizing others to speak for it,

> It does not follow, however, and we did not suggest in *Widmar*, that viewpoint-based restrictions are proper when the University does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers. A holding that the University may not discriminate based on the viewpoint of private persons whose speech it facilitates does not restrict the University's own speech, which is controlled by different principles.

Rosenberger, 515 U.S. at 834.

Courts that allow viewpoint discrimination with respect to school-sponsored speech give insufficient weight to this Court's admonition that viewpoint discrimination is a

particularly "egregious form of content discrimination." *Rosenberger*, 515 U.S. at 829. Thus, the decisions of the Third and Tenth Circuits that *Hazelwood* authorizes viewpoint discrimination as to school-sponsored speech is based on the fact that *Hazelwood* "makes no mention that the school's restriction must be neutral with respect to viewpoint[.]" *Fleming*, 298 F.3d at 928. *Cf. C.H.*, 195 F.3d at 172. Surely the authorization to engage in "egregious" viewpoint discrimination should not arise by implication from what this Court did *not* write.

This case presents the opportunity for this Court to make clear that viewpoint discrimination is intolerable and not justified simply because it is school officials who engage in such discrimination at the expense of students. Schools must not be allowed to selectively censor expression because the point of view of that expression is one of which individual officials disapprove. It is precisely that kind of censorship that occurred in this case, and a writ of certiorari should issue to firmly establish that such censorship is not tolerated by the First Amendment.

II. THE MURALS DID NOT CONSTITUTE SCHOOL-SPONSORED SPEECH SUBJECT TO CENSORSHIP UNDER THE STANDARDS OF *HAZELWOOD*.

The Court of Appeals also erred in holding that the Respondents' actions were to be judged under the standards established by *Hazelwood*. Sharah's murals did not constitute "school-sponsored" speech for purposes of *Hazelwood* because the murals were not part of the school's "curriculum." Thus, this is not a situation where the school

had greater leeway in regulating student speech because it was promoting the speech as held by the decision below.

In *Hazelwood*, this Court held that educators have greater authority to control "school-sponsored" expressive activities. "These activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, *so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.*" The Court went on to write that "[e]ducators are entitled to exercise greater control over this ... form of student expression to assure that participants *learn whatever lessons the activity is designed to teach*, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school." *Hazelwood*, 484 U.S. at 271 (emphasis added).

Thus, the essential aspect of a program that makes it "curricular" or part of a school's "curriculum" is that it relates to or is meant to impart instruction to students. Nothing in the facts of this case indicates that the project to paint the barriers in the school was intended to be instructional or impart knowledge or skills to students. The panel decision recognized that the project was intended to beautify the school (A-2). Other evidence shows that the project was meant to afford an expressive outlet for students.

The only support offered by the panel decision for its ruling that this project was a "curricular activity" is its conclusion that *Hazelwood* defined that term "broadly" and did not limit its application to activities which take place in a classroom. But this Court never held in *Hazelwood* that

"curricular" should be construed or applied broadly. To the contrary, *Hazelwood* held that an activity must be "designed to impart particular knowledge or skills to student participants and audiences" in order for expression during that activity to be considered school-sponsored. 484 U.S. at 271.

In an attempt to fit the mural project within the *Hazelwood* decision, the panel wrote that the project was designed to impart particular knowledge and skills because "it allowed student participants to express themselves artistically, allowed student audiences to appreciate their fellow students' artwork, and promoted school spirit, among other things." (A-11). This passage fails to identify any knowledge or skills that were imparted by the school or its teachers to the project participants in the course of this project. Indeed, and notwithstanding that a member of the faculty was appointed to supervise the project, students worked on their own in painting the murals and were not actually supervised or guided by school officials in how the artwork was accomplished or given instruction on any techniques. The only purposes identified by the Court of Appeals, or apparent from the record, are expression by students and beautification. There is no indication that the project involved imparting knowledge or skills by educators to students.

Thus, the decision below conflicts with the *Hazelwood* as to what activities are a part of a school's "curricular activities." Because the mural project was not part of the school's curriculum, the expression involved was not subject to suppression or censorship under the test established by *Hazelwood*, which requires only that the restriction be reasonably related to some pedagogical interest. *See*

Demmon v. Loudoun County Public Schools, 342 F. Supp. 2d 472, 489-90 (E.D. Va. 2004) (school program allowing students and parents to purchase bricks inscribed with messages for installation as walkway at high school was not related to school's legitimate pedagogical interest; program was not designed to impart skills or knowledge to students).

The Court of Appeals should have, at the very least, applied the more rigorous test applicable to speech in a limited public forum. It rejected this analysis because it determined that the school had not intentionally opened a nontraditional forum for public discourse (A-7). But the record in this case demonstrates that the school had designated this project as one open to all students and school staff and that there could be free and open expression. The project was conducted as a fundraiser by the Student Council. Any students or staff members who paid a small fee were permitted to express themselves freely in their artwork on the construction walls. The only limitations on the students' expression were that their artwork could not be profane or "offensive to someone." There were no limitations on the subject matter of students' artwork other than these instructions, and students were told that the expression was to be their own.

The panel decision held that these limitations were the same kind of editorial control involved in the *Hazelwood* case and so negated the creation of a forum for expression (A-7) (citing *Hazelwood*, 484 U.S. at 268). But *Hazelwood* involved far greater control than the restraints imposed upon students who chose to participate in the mural project. This Court stressed in *Hazelwood* that the expression at issue in that case occurred within the educational curriculum and was part of a regular classroom activity. Moreover, that

decision pointed out that it was clearly understood that any matters to be published in the school newspaper were subject to prior approval by the teacher in charge of the journalism course, Mr. Stergos:

> For example, Stergos selected the editors of the newspaper, scheduled publication dates, decided the number of pages for each issue, assigned story ideas to class members, advised students on the development of their stories, reviewed the use of quotations, edited stories, selected and edited the letters to the editor, and dealt with the printing company. Many of these decisions were made without consultation with the Journalism II students. The District Court thus found it "clear that Mr. Stergos was the final authority with respect to almost every aspect of the production and publication of *Spectrum*, including its content." . . . Moreover, after each *Spectrum* issue had been finally approved by Stergos or his successor, the issue still had to be reviewed by Principal Reynolds prior to publication.

Id. at 268-69.

There was no history of this kind of restraint upon expression with respect to the mural project at issue here. To the contrary, students were informed that they were free to express themselves. Also, there was no effort made by Cathy Roberts, the teacher supervising the project, or Principal Harris to screen or pre-approve the murals. Unlike the situation in *Hazelwood*, students were not required to

submit their mural projects to a school official or employee before they could begin painting. School officials did not seek to control the expression by Sharah until they discovered that the expression invited by the school contained a religious message. *See also Demmon*, 342 F. Supp. 2d at 482-83 (school program allowing students and parent to purchase bricks inscribed with messages for installation as walkway at high school was a limited public forum where school intended that purchasers would be allowed to express themselves; removal of bricks with religious symbols constituted viewpoint discrimination by the school).

Thus, the mural project was not a nonpublic forum, but, at the very least, a limited forum for expression by school students and staff. As such, the school could not suppress speech on the basis of its viewpoint. *Good News Club*, 533 U.S. at 106-07. As discussed in Part I, *supra*, it cannot be doubted that Sharah's murals were censored because of their religious messages, which is quintessential viewpoint-based suppression. *Rosenberger*, 515 U.S. at 829. Judge Black wrote in her concurring opinion below to the panel decision that the decisions in *Rosenberger* and *Lamb's Chapel* "compel us to conclude that this was an instance of view-point based discrimination[.]" (A-17).

Indeed, because this case involves student speech that was not in the course of a curricular activity, the more stringent standard of *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), could have been applied by the courts below. Under *Tinker*, 393 U.S. at 509, a restriction on student speech is valid only if the speech would materially and substantially disrupt the operation of the school or discipline at the school. It is not proper for school officials to censor student expression because of a

desire to avoid a controversy which might result from the expression. *Id.* at 510. A desire to avoid controversy was precisely the basis for the censorship in this case.

Although the courts below referred to the fact that a "commotion" was caused by the murals (A-3), neither court found that there was a material or substantial disruption of the school's operations. Moreover, school officials may not suppress "silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of" the speaker. *Id.* at 509. Allowing the disagreements and objections of a few to be the justification for suppressing speech would grant a "heckler's veto" over expression that is inconsistent with established First Amendment principles. *Good News Club*, 533 U.S. at 119 (citing *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 779-80 (1995) (O'Connor, J., concurring in part and concurring in judgment).

Because the Court of Appeals erred in holding that this viewpoint discrimination was justified under *Hazelwood*, its judgment must not be allowed to stand. A writ of certiorari should issue to vindicate the First Amendment rights of the Petitioner and prevent the use of the Court of Appeals decision in this case as justification for further acts of viewpoint discrimination.

CONCLUSION

For the reasons set forth above, the Petitioner respectfully requests that this Honorable Court grant the Petition and issue a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit to review its judgment in this case.

Respectfully submitted,

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No. _____

In The
Supreme Court of the United States

SHELDA HARRIS BANNON,
as parent and natural guardian of her daughters
Sharah Harris and Brittni Harris,

Petitioner,

v.

SCHOOL DISTRICT OF PALM BEACH COUNTY,
a body corporate, and ED HARRIS, individually
and in his capacity as principal of
Boca Raton Community High School,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the
Eleventh Circuit

APPENDIX

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APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 03-13011

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
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D.C. Docket No. 02-80438-CV-DTKH

SHELDA HARRIS BANNON, as parent and natural guardian of her daughters Sharah Harris and Brittni Harris,

Plaintiff-Appellant,

versus

SCHOOL DISTRICT OF PALM BEACH COUNTY, a body corporate, ED HARRIS, individually and in his capacity as principal of Boca Raton Community High School, JOE SABIA, individually and in his capacity as Girl's Basketball Coach of Boca Raton Community High School,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(October 12, 2004)

Before BLACK, BARKETT and MAGILL[2], Circuit Judges.

PER CURIAM:

Appellant Shelda Harris Bannon, on behalf of her daughter Sharah Harris, alleged that Appellees, School District of Palm Beach County and Principal Ed Harris, violated Sharah's First Amendment rights by compelling her to remove religious words and symbols from murals painted for a school beautification project. The district court granted summary judgment for Appellees because it concluded (1) Appellees never created a public forum, (2) the murals were school-sponsored speech, and, (3) Appellees' response was reasonably related to legitimate pedagogical objectives. We affirm.

I. BACKGROUND

This litigation concerns a school beautification project at a religiously diverse public school. While the school was undergoing long-term remodeling, students were prevented from walking into construction areas by dozens of large plywood panels in interior and exterior hallways. These panels were ugly, and would remain a part of the school for up to four years. To beautify the school, students were invited to paint murals on the panels. The school did not specifically prohibit students from expressing religious views. The school did, however, instruct students that their artwork could not be profane or offensive to anyone.

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[2] Honorable Frank J. Magill, United States Circuit Judge for the Eighth Circuit, sitting by designation.

Sharah, a high school senior and member of the Fellowship of Christian Athletes (FCA), decided to participate in this beautification project. Although Sharah and her FCA colleagues planned to use verbal messages and religious symbols, they never gave Principal Harris or Cathy Roberts (the teacher supervising the beautification project) any notification or advance warning. No other student murals had verbal messages. On a Saturday afternoon, Sharah and other FCA students painted several murals with various religious messages and symbols.

Three of these murals were most notable. Sharah's first mural was next to the school's main office, had a crucifix in the background, and paraphrased *John* 3:16 as "Because He ♥ed, He Gave." Sharah's second mural was only a few panels down from the office and read, "Jesus has time for you; do you have time for Him?" Sharah's FCA colleagues painted a third mural, located in a main hallway, that read, "God Loves You. What Part of Thou Shalt Not Didn't You Understand? God."[3]

The following Monday morning, Principal Harris found a commotion on campus near Sharah's murals involving vocal students and teachers. Later that day, the murals received media attention in the form of phone calls, reporters from three television stations, and newspaper reporters. This publicity and controversy distracted the attention of students, teachers, and administrators from schoolwork, teaching, and administrative duties. As Principal Harris explained in his deposition, the expression

[3] We refer to these three murals collectively as "Sharah's murals" or "the murals."

in Sharah's murals interfered with the operation of the school,

> because if it takes any time away from the productivity of the school in itself and the length of time that I had to spend on this, taking the principal's time, the assistant principal's time, the student's time away [from] the main focus of the school, . . . [so] the school was focusing more on the panels, overall, more so than [it] was focusing on the reason we were here.

Principal Harris did not expel, suspend, or otherwise punish Sharah for painting her murals. Instead, Principal Harris spoke about the murals with Ms. Roberts. Shortly thereafter, Ms. Roberts invited Sharah to step outside of class to speak privately. During this discussion, Ms. Roberts explained that although Sharah would need to paint over the overt religious words and sectarian symbols on all three murals, such as "Jesus," "God," and the crucifix, her other images and messages could remain. During her deposition, Sharah conceded this selective deletion was an attempt to keep her happy. Sharah repainted her murals and the FCA murals after school. Notably, Sharah was not the only student whose mural was edited. Principal Harris directed the removal of profanity, gang symbols, and satanic images from students' murals.

Appellant filed suit,[4] but the district court granted summary judgment for Appellees on the First Amendment

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[4] Appellant alleged claims on behalf of both her daughters, Sharah and Brittni. On behalf of Brittni, Appellant alleged a Title IX

claims because it concluded Appellees did not create a public forum. Instead, the district court reasoned the beautification project fell "squarely in the category of school sponsored speech." Applying *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), which governs school-sponsored expression, the district court held Principal Harris's restrictions were "reasonably related to [the] legitimate pedagogical goal[s of] . . . . disassociating [the school] from religious organizations and the endorsement of religious views . . . . [and] avoiding disruption [to the learning environment] from religious debate on the walls of the school."[5] Appellant appealed.

II. DISCUSSION

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violation against Brittni's basketball coach. On behalf of Sharah, Appellant alleged violations of the First Amendment, as applicable to the states through the Fourteenth Amendment of the U.S. Constitution, via 42 U.S.C. § 1983, and the Florida Constitution's free exercise, free speech, and equal protection clauses. Appellant voluntarily dismissed her Title IX claims on behalf of Brittni, and does not argue on appeal that Appellees acted in violation of the Florida Constitution. Accordingly, our review is limited to the district court's denial of Appellant's First Amendment claims.

[5] *Hazelwood* involved a principal's decision to delete two articles from a high school newspaper, which was written and edited by a journalism class. 484 U.S. at 262-64. One article described several students' experiences with pregnancy, while the other discussed the impact of divorce on students at the school. *Id.* The principal believed the articles were inappropriate for publication because (1) despite the use of pseudonyms, the pregnant girls might be identifiable, (2) references to sexual activity and birth control were inappropriate for younger students, and (3) the divorce story did not give the interviewed students' parents an opportunity to respond or consent to publication. *Id.* The *Hazelwood* Court upheld the restrictions in the face of a First Amendment challenge. It concluded that the articles were school-sponsored speech and that the restrictions were reasonably related to legitimate pedagogical concerns. *Id.* at 273-76.

Appellant first contends the district court erred because it did not subject the school's action to the First Amendment standards applicable in designated or limited public fora. Alternatively, even if the district court properly concluded Appellees did not create a public forum, Appellant contends the district court improperly applied *Hazelwood*, 484 U.S. at 273 (holding schools may restrict school-sponsored expression so long as the restriction is "reasonably related to legitimate pedagogical concerns"). Appellant maintains *Hazelwood*'s standards do not apply when (1) the expression occurs during a noncurricular activity, or (2) the school's censorship of expression amounts to viewpoint discrimination. In lieu of applying *Hazelwood*, therefore, Appellant suggests the district court instead should have applied the rigorous standard of *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 511 (1969) (holding schools must tolerate pure student expression unless censorship is "necessary to avoid material and substantial interference with schoolwork or discipline"). We review the district court's grant of summary judgment de novo. *Hoffman v. Allied Corp.*, 912 F.2d 1379, 1383 (11th Cir. 1990). For the reasons that follow, we affirm.

A. *Public Forum Analysis*

For First Amendment purposes, there are three kinds of government property: (1) traditional public fora, (2) designated public fora, and (3) nonpublic fora. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46, 74 L. Ed. 2d 794, 103 S. Ct. 948 (1983). In this instance, because the mural project was neither a traditional nor a designated public forum, it was a kind of nonpublic forum.

The mural project was not a traditional public forum. "[P]ublic schools do not possess all of the attributes of streets, parks, and other traditional public forums that time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hazelwood*, 484 U.S. at 267 (internal quotation marks and citations omitted).

Neither was the mural project a designated public forum. "The government does not create a public forum by inaction or by permitting limited discourse, but *only by intentionally opening a nontraditional forum for public discourse.*" *Id.* (emphasis added; citations and internal quotation marks omitted). Indeed, a school creates a designated public forum only when "school authorities have by policy or practice opened those facilities for indiscriminate use by the general public, or by some segment of the public, such as student organizations." *Id.* (internal quotation marks and citations omitted). When a school retains editorial control over a forum, it has not created a designated public forum. *See id.* at 268 (concluding that a school newspaper was not a public forum because school authorities retained ultimate editorial control over production, publication, and content).

Far from "intentionally" opening a public forum for "indiscriminate use," Appellees merely solicited students to participate in a school beautification project. No record evidence demonstrates Appellees evinced an *intention*, "by policy or practice," to designate the school beautification project as a public forum in which students or anyone else could freely express any and all of their political, religious, or other views. Instead, Appellees always retained editorial control over the murals in at least three ways. First, Principal Harris explicitly instructed students that none of the murals

could be profane or offensive. Second, the mural project was supervised by Ms. Roberts, a faculty member. Finally, although Principal Harris told students to express themselves, he never said the murals were a forum for expressing their political or religious views. Thus, we conclude Sharah's expression did not occur in a traditional or designated public forum.

For these reasons, the district court correctly held Sharah's expression occurred in a nonpublic forum.

B. *Scholastic Nonpublic Fora*

Generally, in nonpublic fora, the government can regulate expression so long as its regulations "are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985). In school settings, however, the analysis is slightly more refined based on the identity of the speaker and the nature of the expression. Within scholastic nonpublic fora, there are four clear categories of expression: vulgar expression, pure student expression, government expression, and school-sponsored expression.

Vulgar expression is student expression that is lewd, offensive, or indecent, and schools may freely curtail it. *Bethel School Dist. v. Fraser*, 478 U.S. 675, 685 (1986). Pure student expression is student expression that merely happens to occur on the school premises, and schools must tolerate such expression unless they can reasonably forecast that the expression will lead to "substantial disruption of or material interference with school activities." *Tinker*, 393 U.S. at 514. Government expression is expression delivered

directly through the government or indirectly through private intermediaries, and the government is free to make subject-matter-based choices. *See Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995). Finally, between the spectrum of pure student expression and government expression is the intermediate category of school-sponsored expression: when "students, parents, and members of the public might reasonably perceive [students' expressive activities] to bear the imprimatur of the school," schools may censor student expression so long as their actions are reasonably related to legitimate pedagogical concerns. *Hazelwood*, 484 U.S. at 271-73.

1. *The Imprimatur Test and Curricular Expression*

The district court concluded Sharah's murals were school-sponsored expression, and consequently applied *Hazelwood*. Appellant argues this was error. Citing this Court's opinion in *Searcey v. Harris*, 888 F.2d 1314 (11th Cir. 1989), Appellant contends *Hazelwood* only applies to expression that occurs in the context of curricular activities, as opposed to noncurricular activities. In other words, even if expression is sponsored by or bears the imprimatur of the school, Appellant argues *Hazelwood* only applies when the expression occurs in the context of curricular activities. To complete this argument, Appellant maintains the beautification project did not occur in the context of a curricular activity because (1) Appellees did not require students to participate, (2) students received no grade or credit for participation, (3) the murals were painted on a Saturday outside of regular school hours, and (4) students paid a small fee to participate. As such, Appellant argues Appellees' policy was subject to the rigorous standards of *Tinker*, rather than the standards of *Hazelwood*.

We agree *Hazelwood* only controls school-sponsored expression that occurs in the context of a curricular activity, but conclude Sharah's murals occurred in such a curricular context. Thus, the murals constituted school-sponsored expression within the meaning of *Hazelwood*.

Hazelwood controls all expression that (1) bears the imprimatur of the school, and (2) occurs in a curricular activity. *Hazelwood*, 484 U.S. at 271-73; *Searcey*, 888 F.2d at 1319 n.7. Here, there is no question students, parents, and other members of the public might reasonably believe Sharah's murals bear the imprimatur of the school. The murals appear in prominent locations in the school. The first mural is next to the school's main office, the second mural also is near that office, and the third mural appears in a main hallway. Given the location of these murals, a reasonable "observer would likely perceive that the school had a role in setting guidelines for, and ultimately approving, the [murals] it allowed to become a part of the school itself, which in this case, it did." *Fleming v. Jefferson County Sch. Dist. R-1*, 298 F.3d 918, 930 (10th Cir. 2002). More specifically, the beautification project was approved in advance by Principal Harris, advertised by the school, supervised by Ms. Roberts, limited to students and faculty who paid a fee to participate, and subject to the school's editorial control.

The real question is whether Sharah's expression occurred in the context of a curricular activity. In arguing Sharah's expression did not occur in the context of a curricular activity, Appellant underestimates how broadly the *Hazelwood* Court defined curricular activities. To be considered curricular, expressive activities need not occur in a "traditional classroom setting." *Hazelwood*, 484 U.S. at 271.

Instead, expressive activities are curricular so long as they are merely (1) "supervised by faculty members," and (2) "designed to impart particular knowledge or skills to student participants and audiences." *Id.* In contrast to Appellant's position, *Hazelwood* never defined curricular activity in terms of whether student participation was required, earned grades or credit, occurred during regular school hours, or did not require a fee.

Here, even though Sharah did not paint her murals in a traditional classroom setting, her expression still occurred in the context of a curricular activity. The first prong is met because Principal Harris and Ms. Roberts were faculty members who supervised the beautification project. Likewise, the second prong is satisfied because the beautification project was designed to impart particular knowledge and skills to student participants and audiences; it allowed student participants to express themselves artistically, allowed student audiences to appreciate their fellow students' artwork, and promoted school spirit, among other things. Appellant's arguments that Sharah's expression did not occur in the context of a curricular activity--because students were not required to participate, they received no grade or credit for participation, the murals were painted on a Saturday outside of regular school hours, and students paid a small fee to participate--simply have no toehold in the relevant legal doctrines. They ignore how broadly the Supreme Court has defined school curricula for *Hazelwood*'s purposes. As such, Sharah's expression occurred in the context of a curricular activity.

Sharah's expression bore the imprimatur of the school and occurred in the context of a curricular activity, so

Appellees can censor her expression subject to the limitations announced in *Hazelwood*.

2. *Viewpoint or Content Restriction?*

Appellant maintains that, although *Hazelwood* permits subject-matter-based restrictions on school-sponsored student expression, it does not permit viewpoint-based discrimination. We agree with Appellant that *Hazelwood* does not allow a school to censor school-sponsored speech based on viewpoint. *See Searcey*, 888 F.2d at 1325 ("[a]lthough *Hazelwood* provides reasons for allowing a school official to discriminate based on *content*, we do not believe it offers any justification for allowing educators to discriminate based on viewpoint.") (emphasis in original).[6] In this case, however, the school did not engage in viewpoint discrimination, but rather censored the murals on the basis of their content. We reject the contention that *Rosenberger* and *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993), require us to view the school's actions here as a form of impermissible viewpoint discrimination. The school's refusal to allow Sharah, or anyone else, to make explicitly religious statements in murals that literally became

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[6] In *Searcey*, we addressed whether *Hazelwood* permitted viewpoint-based discrimination in a case brought by a nonstudent group, the Atlanta Peace Alliance (APA), that wanted to speak at a school's career day. 888 F.2d at 1315. The school did not let the APA speak. *Id.* We held the school could not exclude the APA from its career day, and stated that "[w]ithout more explicit direction, we will continue to require school officials to make decisions relating to speech which are viewpoint neutral." *Id.* at 1325. Our conclusion in *Searcey* that *Hazelwood* does not permit viewpoint discrimination encompasses the sort of school-sponsored speech that was at issue in *Hazelwood*, which was student speech in a school-sponsored newspaper. *Hazelwood*, 484 U.S. at 273.

part of the school's walls is unlike the restrictions at issue in these cases.

Both decisions involved schools that prevented speakers from participating in a school-created forum because of the speakers' religious viewpoints. In *Lamb's Chapel*, a school board had a policy of allowing groups to use school property after-hours for a variety of social, civic, and recreational uses. 508 U.S. at 386. Regulations adopted by the board required that the "school premises shall not be used by any group for religious purposes." *Id.* at 387. Based on this regulation, the board refused a church group's request to screen a film series presenting a psychologist's "views on the undermining influences of the media that could only be counterbalanced by returning to traditional, Christian family values instilled at an early stage." *Id.* at 388-89. The Supreme Court found that the board's decision to deny access to the group constituted viewpoint discrimination, since the group was prevented from discussing the otherwise permissible topics of child rearing and family values because of the group's religious perspective. *Id.* at 393-94.

In *Rosenberger*, students at the University of Virginia sought and were denied funding for a "magazine of philosophical and religious expression" that addressed topics, such as racism, of daily importance to university students. 515 U.S. at 825-26. Because other student publications, without a religious perspective, were allowed to address these approved subjects, the Court held that the regulation amounted to viewpoint discrimination. *Id.* at 831-32. Importantly, the *Rosenberger* Court explained that the University did not restrict the subject matter of religion. *Id.* at 831. ("By the very terms of the [University's] prohibition, the University *does not exclude religion as a subject matter* but

selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints.") (emphasis added).

Based on the above, we find both cases readily distinguishable from the facts of the current case. We note initially that neither *Lamb's Chapel* nor *Rosenberger* involved school-sponsored speech that could be attributed to the school. *Lamb's Chapel*, 508 U.S. at 395 (observing that "[t]he showing of this film series would not have been during school hours" and "would not have been sponsored by the school"); *Rosenberger*, 515 U.S. at 841 ("In this case, 'the government has not fostered or encouraged' any mistaken impression that the student newspapers speak for the University. The University has taken pains to disassociate itself from the private speech involved in this case.") (internal quotation marks and citation omitted). Despite the absence of school-sponsored speech in these cases, Appellant would have us adopt a reading of these decisions that would *require* a school, under the circumstances presented here, to allow students to use the walls of a public school to proselytize. In our view, neither case mandates such a result. Unlike the speech censored in *Lamb's Chapel* and *Rosenberger*, Sharah was not discussing secular topics from a religious perspective. Sharah's first mural (which included an image of a crucifix and the words "Because He Loved, He Gave.", based on *John* 3:16) referred to Christ's crucifixion. Sharah's second mural ("Jesus has time for you; do you have time for Him?") was a call for students to develop a personal relationship with Christ. The last mural by Sharah's colleagues ("God Loves you. What Part of Thou Shalt Not Didn't You Understand? God.") purported to be a message from God. These are obviously inherently religious messages, which cannot be recast as the discussion of secular

topics from a religious perspective. Since the school did not permit any student in the context of a curricular activity to communicate such messages, it restricted speech on the basis of content, not viewpoint.[7] Therefore, *Lamb's Chapel* and *Rosenberger* do not bar the school's non-discriminatory response to the controversy generated by Sharah's murals.

As explained earlier, a school's content-based censorship of school-sponsored student expression survives review under *Hazelwood* if it is reasonably related to legitimate pedagogical concerns. 484 U.S. at 273. Here, the district court correctly held that Appellees had a legitimate pedagogical concern in avoiding the disruption to the school's learning environment caused by Sharah's murals. *Fleming*, 298 F.3d at 934. Appellees' policy in prohibiting religious expression on its walls was reasonably related to this legitimate pedagogical concern because it ended the disruption. *See id.*

III. CONCLUSION

For the foregoing reasons, we conclude Sharah's murals were school-sponsored expression in a nonpublic forum subject to restriction under *Hazelwood* because they occurred in the context of a curricular activity, and students, parents, and members of the public might reasonably believe

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[7] As the *Rosenberger* Court explained, "the necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for . . . the discussion of certain topics." 515 U.S. at 829. This statement presupposes the legitimacy of content-based regulations in a limited public forum.

them to bear the imprimatur of the school. We hold Appellees' censorship of Sharah's school-sponsored murals was a reasonable content-based restriction that was rationally related to the legitimate pedagogical concern of avoiding the religious controversy and debate generated by Sharah's murals.

AFFIRMED.

BLACK, Circuit Judge, specially concurring:

I join the result reached by the majority decision. I write separately because I do not believe *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819, 115 S. Ct. 2510 (1995) and *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 113 S. Ct. 2141 (1993) are as readily distinguishable from the present case as the majority. I think these cases compel us to conclude that this was an instance of viewpoint-based discrimination, not content-based discrimination. A finding of viewpoint discrimination, however, does not change the result in this case because *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 108 S. Ct. 562 (1988), allows for viewpoint-based discrimination against school-sponsored student expression.

In *Hazelwood*, the Supreme Court addressed the First Amendment implications of a high school principal's excision of two pages worth of articles from a high school newspaper. In that case, a high school journalism class wrote and edited a school newspaper called *Spectrum*. *Hazelwood*, 484 U.S. at 262, 108 S. Ct. at 565. In one issue of the paper, two articles were scheduled to appear discussing student pregnancy and the impact of divorce on students. *Id.* at 263, 108 S. Ct. at 565-66. The principal objected to the publication of the articles because he believed, *inter alia*, that the material was not suitable for younger students. *Id.* at 263, 108 S. Ct. at 566. Accordingly, the principal cut the entire two pages on which these articles appeared. *Id.* at 263-64, 108 S. Ct. at 566. The Supreme Court held the school was not required to promote affirmatively this particular school-sponsored

student expression. It explained the school's decision was reasonably related to the legitimate pedagogical concern, among other things, of preventing the distribution of "frank talk" about girls' "sexual histories and their use or nonuse of birth control. . . . in a school-sponsored publication distributed to 14-year-old freshmen and presumably taken home to be read by students' even younger brothers and sisters." *Id.* at 274-75, 108 S. Ct. at 572. In reaching this conclusion, however, unlike the approach of typical nonpublic forum cases such as *Cornelius v. NAACP Legal Defense & Education Fund, Inc.*, 473 U.S. 788, 105 S. Ct. 3439 (1985), the Supreme Court did not clarify whether schools could make this decision solely on the basis of the student expression's subject matter, or also on the basis of the student expression's viewpoint.

In *Searcey v. Harris*, 888 F.2d 1314 (11th Cir. 1989), we examined whether *Hazelwood* permitted viewpoint-based discrimination in the context of school-sponsored non-student expression. There, the school refused to let a nonstudent group speak at the school's career day. *Id.* at 1315. We concluded the school's actions did not run afoul of *Hazelwood* and stated that "[w]ithout more explicit direction, we will continue to require school officials to make decisions relating to speech which are viewpoint neutral." *Id.* at 1325.

Appellant, therefore, contends *Searcey* dictates that *Hazelwood* proscribes censorship of school-sponsored student expression on the basis of viewpoint. I disagree. On the contrary, *Searcey* does not control the instant situation because it did not involve school-sponsored *student* expression. Instead, *Searcey* involved a non-student outside group that wanted to speak at a school function. As such, *Searcey* merely stands for the proposition that when a school

has opened itself to outside speakers for some school-sponsored function, such as career day, it may not discriminate against the outside speakers' viewpoints. I am compelled to distinguish *Searcey* and conclude *Hazelwood* permits viewpoint-based discrimination against school-sponsored *student* expression for three reasons.

First, language in the *Hazelwood* opinion itself suggests schools may censor school-sponsored student expression on the basis of its viewpoint:

> A school must also retain the authority to refuse to sponsor *student speech* that might unreasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with the shared values of a civilized social order, or to associate the school with any position other than neutrality on matters of political controversy.

Hazelwood, 484 U.S. at 271, 108 S. Ct. at 570 (emphasis added; citations and internal quotation marks omitted). This language suggests schools may promote school-sponsored student expression that advocates certain views, while simultaneously censoring school-sponsored student expression that advocates contrary views. This is the epitome of discrimination based on viewpoint. We did not deal with student expression in *Searcey*; therefore we had no reason to address this *Hazelwood* language.

Second, despite *Hazelwood*'s silence on viewpoint neutrality, the majority of our sister circuits to consider the

question have held *Hazelwood* permits viewpoint-based discrimination. The First and Tenth Circuits have held *Hazelwood* permits viewpoint discrimination. *Fleming v. Jefferson County Sch. Dist. R-1*, 298 F.3d 918, 928 (10th Cir. 2002), *cert. denied*, 537 U.S. 1110, 123 S. Ct. 893 (2003); *Ward v. Hickey*, 996 F.2d 448, 453-54 (1st Cir. 1993). Only the Ninth Circuit has concluded *Hazelwood* does not permit viewpoint discrimination. *See Planned Parenthood of S. Nev., Inc. v. Clark County Sch. Dist.*, 941 F.2d 817, 829 (9th Cir. 1991) (en banc) (analyzing whether a censorship was viewpoint neutral, without first explaining whether *Hazelwood* requires viewpoint neutrality).

The majority rule of the First and Tenth Circuits better addresses the special situation of public schools by giving educators discretion to discriminate against school-sponsored student expression on the basis of viewpoint. As the Tenth Circuit explained, the *Hazelwood* Court's "specific reasons supporting greater control over school-sponsored speech, such as determining the appropriateness of the message, the sensitivity of the issue, and with which messages a school chooses to associate itself, often will turn on viewpoint-based judgments." *Fleming*, 298 F.3d at 928. "No doubt the school could promote student speech advocating against drug use, without being obligated to sponsor speech with the opposing viewpoint. *Hazelwood* entrusts to educators these decisions that require judgments based on viewpoint." *Id.* I agree. If viewpoint discrimination were forbidden, then a school that allowed a mural to say "God loves you. What part of thou shalt didn't you understand? God" might also have to allow a mural to say "Your God is dead. Long live Beelzebub." This would be an absurd result.

In contrast, the minority approach of the Ninth Circuit is not persuasive because it never explained why *Hazelwood* proscribes viewpoint-based discrimination. Indeed, a Ninth Circuit panel recently criticized the *Planned Parenthood* decision because, "despite the absence of express 'viewpoint neutrality' discussion anywhere in *Hazelwood*, the *Planned Parenthood* court incorporated 'viewpoint neutrality' analysis into nonpublic forum, school-sponsored speech cases in our Circuit." *Downs v. Los Angeles Unified Sch. Dist.*, 228 F.3d 1003, 1010 (9th Cir. 2000).

Third, as a policy matter, unlike other school-sponsored expression, school authorities need more discretion to control school-sponsored *student* speakers. Schools must not be "unduly constrained from fulfilling their role as a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." *Hazelwood*, 484 U.S. at 272, 108 S. Ct. at 570 (citation and internal quotation marks omitted). Additionally, in the long run, this approach will promote more school-sponsored expression by giving school administrators more control over the viewpoint of such expression.[8] *See id.* at 276 n.9, 108 S. Ct. at 572 n.9

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[8] I caution, however, that when a school discriminates against expression on the basis of its viewpoint, it runs a greater risk of having its policy struck down for its failure to be reasonably related to legitimate pedagogical concerns. *See* Samuel P. Jordan, Note, *Viewpoint Restrictions and School-Sponsored Student Speech: Avenues for Heightened Protection*, 70 U. Chi. L. Rev. 1555, 1573 (2003) (explaining schools should not allow viewpoint discrimination against school-sponsored expression to be justified "with just any pedagogical purpose"). For example, I would be hard pressed to find a school policy was reasonably related to any legitimate pedagogical concern if it sponsored student expression in favor

(suggesting that, if administrators were not given such control, schools would tend to silence all school-sponsored expression rather than allow uncontrolled school-sponsored expression); *Fleming*, 298 F.3d at 934 ("When posed with such a choice, schools may very well elect to not sponsor speech at all, thereby limiting speech instead of increasing it."). If schools cannot control the viewpoint of the student expression they sponsor, there will likely be fewer school-sponsored student publications, student theatrical productions, student concerts, student speeches, or other expressive activities for students.

For these reasons, I conclude *Hazelwood* permits schools to discriminate against school-sponsored student expression on the basis of viewpoint.

A school's censorship of school-sponsored student expression survives review under *Hazelwood* if it is reasonably related to legitimate pedagogical concerns. 484 U.S. at 273, 108 S. Ct. at 571. Here, the district court correctly held Appellees had a legitimate pedagogical concern in avoiding disruption to the learning environment from religious debate erupting on school walls. *Fleming*, 298 F.3d at 934. I believe Appellees' policy in prohibiting religious expression on its walls was reasonably related to this legitimate pedagogical concern.[9]

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of Republicans, but did not permit school-sponsored student expression in favor of Democrats, or vice-versa.

[9] Given my conclusion, there is no need for me to address Appellees' alternative argument that they had a legitimate pedagogical concern in avoiding an *Establishment Clause* violation.

Sharah's murals were school-sponsored expression in a nonpublic forum subject to restriction under *Hazelwood* - the murals were painted as part of a curricular activity and the public, as well as teachers and students, could have reasonably believed the murals bore the imprimatur of the school. Although Appellees censored Sharah's school-sponsored murals on the basis of their religious viewpoint, *Hazelwood* permits such viewpoint discrimination so long as the school's actions are reasonably related to legitimate pedagogical concerns. Here, the school's request that Sharah paint over certain parts of her murals was reasonably related to the school's interest in avoiding disruption to the learning environment caused by the reaction to the murals. Therefore, I conclude that the school's viewpoint-based discrimination, not content-based, was permissible under *Hazelwood*.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
DEC 09 2004
THOMAS K. KAHN
CLERK

No. 03-13011-HH

SHELDA HARRIS BANNON,
As parent and natural guardian of her daughters, Sharah Harris and Brittni Harris,

Plaintiff-Appellant,

versus

SCHOOL DISTRICT OF PALM BEACH COUNTY,
a body corporate,
ED HARRIS,
individually and in his capacity as principal of Boca Raton Community High School,
JOE SABIA,
individually and in his capacity as Girl's Basketball Coach of Boca Raton Community High School,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of Florida

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Before: BLACK, BARKETT and MAGILL*, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the

Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Rosemary Barkett
UNITED STATES CIRCUIT JUDGE

ORD-42
(6/95)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 02-80438-CIV-HURLEY/LYNCH

SHELDA HARRIS BANNON, as parent and natural guardian of her daughters, SHARAH HARRIS and BRITTNI HARRIS,
Plaintiffs,

vs.
THE SCHOOL DISTRICT of PALM BEACH COUNTY, et al.

Defendants.
_____/

FILED BY ___ D.C.
MAY 12 2003
CLARENCE MADDOX
CLERK OF U.S. DIST. CT.
S.D. OF FLA. - W.P.B.

ORDER GRANTING FINAL SUMMARY JUDGMENT

Plaintiff Shelda Harris Bannon, on behalf of her dauthter Sharah Harris, sues the School District of Palm Beach County ("the District") alleging that the District violated her constitutional rights under the free speech clause and free exercise clause of the United Constitution and the Florida State Constitution by directing Sharah Harris to delete the religious content of a wall mural which she painted as a student participant in a school beautification project at Boca Raton Community High School.

The case is now before the court upon the District's motion for summary judgment [DE #35]. Having carefully reviewed the parties memoranda of law and heard argument of counsel, the court has determined to grant the motion for reasons which follow.

Facts

In February, 2002, Sharah Harris was enrolled as a student in the 12th grade at Boca Raton Community High School ("Boca High"). At that time, the student government at Boca High hosted a school beautification project involving the painting of murals on wooden 4 x 8 construction panels erected as corridor dividers during a school reconstruction project. A faculty sponsor, Katherine Roberts, was assigned to oversee the mural project.

The school charged a five dollar ($5) fee to participate in the project. Sharah Harris voluntarily participated as a member of The Fellowship of Christian Athletes, a student club at the school, which paid the $5 participation fee. Ms. Harris painted her murals on a Saturday, choosing religious subjects: One contained bible verse and the words, "God Loves You. What Part of 'Thou Shalt Not' Don't You Understand? God." Another depicted the sun as background with a cross and the words "Jesus" and "God." According to Ms. Harris, she received some of these ideas from Coach Brandon Kornblue, one of the sponsors of the Fellowship of Christian Athletes, who had found the concepts on a website called "The God Signs."

In response to a concern over the religious content voiced by the faculty sponsor, the principal of Boca High, Mr. Ed Harris, directed Sharah Harris to delete the cross and words "God" and "Jesus" from her murals. Harris issued this directive pursuant to School District Policy 2.122 entitled "Religious Freedom" which promotes a policy of neutrality on religious matters, and to that end, prohibits the School

Board from sponsoring any religious activities or advancing any religious beliefs.

The plaintiff complains that the compelled excision of the cross and other religious references from her daughter's paintings interfered with their First Amendment rights of free speech and free exercise of religion. She brings this suit under 42 U.S.C. § 1983 to redress these alleged abridgements with compensatory and punitive damages as well as injunctive relief.[10]

Discussion

First Amendment protection over speech which occurs in a school setting divides into several compartments. First, there is "pure student expression " which is student speech that "happens to occur on the school premises," *Tinker v Des Moines Independent Community School District*, 393 U.S. 503, 89 S. Ct. 733, 21 L.Ed. 2d 731 (1969)(black armband symbolic speech), expression which must be tolerated unless the school can reasonably forecast that the expression will lead to substantial disruption of or material interference with school activities." 393 U.S. at 514, 89 S. Ct. 733. Second, on the opposite end of that spectrum there is "vulgar," "lewd" and "plainly offensive" student speech governed by *Bethel School District No. 43 v. Fraser*, 478 U.S. 675, 106 S. Ct. 3159, 92 L.Ed.2d 549 (1986), which may be freely curtailed.

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[10] Since Sharah Harris graduated from Boca Raton High School in 2002, her request for injunctive and declaratory relief to preclude future interference with student religious expression is moot. *Adler v Duval County School Board*, 112 F.3d 1475 (11th Cir. 1997). Recognizing this limitation, the parties stipulated at oral argument that the plaintiffs' remaining claims are limited to money damages.

Third, there is private speech delivered on school property operating either as a public forum – under policy or practice of offering indiscriminate use to general public or segments of public such as student organizations – or as a "limited public forum" – where secular and non-secular groups are granted equal access to property for *after-hour* meetings. Here, the school retains no editorial control over speech content and the expression of religious beliefs may occur in a voluntary private group setting. *Compare Good News Club v Milford Central School*, 533 U.S. 98 (2001)(Bible Club's exclusion from after hour meetings based on religious content held unconstitutional viewpoint discrimination, where meeting privilege was extended to secular groups) *with Edwards v. Agilard*, 482 U.S. 578 (1987)(state "creationism act" requiring teaching of "creation science" in conjunction with evolution teaching held violative of Establishment Clause, where proposed expressive activity was to occur in classroom requiring mandatory attendance during school day). Fourth, there is government speech, delivered either directly or through private intermediaries – for example through a school principal – where the government is free to make content based choices. *Wells v. City & County of Denver*, 257 F.3d 1132, 1144 (10th Cir. 2001), *cert. den.*, 122 S. Ct. 469, 151 L.Ed.2d 384 (2001).

Finally, there is "school sponsored speech" which is student speech that a school affirmatively promotes, as opposed to speech that it tolerates, which included "expressive activities that other student, parents and members of the public might reasonably perceive to bear the imprimatur of the school" *Hazelwood School District of Kuhlmeier*, 484 U.S. 260 (1988), 108 S. Ct. 562, 98 L. Ed.2d 592 (1988). In this category of speech, the school may exercise

substantial editorial control as long as its actions are "reasonably related to legitimate pedagogical concerns." *Hazelwood*, at 271-273, 108 S. Ct. 562. *See e.g. Santa Fe Independent School District v Doe*, 530 U.S. 290, 120 S. Ct. 2266, 147 L.Ed.2d 295 (2000) (student initiated invocations before football games not protected under free exercise clause where invocations took place on school property during school sponsored event and might reasonably be perceive by audience as public expression of majority views delivered with school district's approval).

As a threshold matter, the court rejects the proposition that Boca High mural project occurred in a public forum. The project was not opened up for indiscriminate use by the general public or some segment of the general public. The District opened the project to its students, supervised the student painting sessions and actively screened out inappropriate murals.[11] By showing this affirmative intent to retain editorial control over the project, the District demonstrated that it did not intend to open the project for indiscriminate use by participants but instead reserved the project for its intended purpose of encouraging student participation in the beautification of school grounds. The court also rejects the proposition that the mural project occurred in a limited public forum because while the murals were was created during off hours, the proposed religious content of the murals would have been perpetually displayed and delivered during school hours to a captive audience of other students and teachers.

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[11] Prinicipal Harris testified that he also directed the deletion of several gang symbols and profanity which had been painted on other murals.

This project falls squarely in the category of school sponsored speech. Recognizing, under *Hazelwood*, that educators are entitled to exercise greater editorial control over student expression when it is elicited as part of a teacher supervised, school sponsored activity, the court finds that the District's restriction over the religious content of the subject painting represents a permissible exercise of that control. Plainly, the murals bore the "imprimatur" of the school, appearing as they did on 4 x 8 wood panels erected as temporary walls and corridor dividers during a school reconstruction project which has endured for an extended period of time, spanning over a year as of the time of oral argument, with an indefinite projected future term.

Although the painting occurred during off hours, the effects of the paintings were highly visible on corridor walls and passageways throughout the campus which other students were required to navigate during school hours. When coupled with the student government's sponsoring of the project, and the faculty supervision of that project, the school decision to thus display the murals conveyed a level of approval of the message, stamping the murals with the imprimatur of the school.

The analysis next turns to whether the District's restriction over this school sponsored speech in this case was reasonably related to a legitimate pedagogical goal The court recognizes that the environment in which learning takes place, such as a school's corridors, can be a pedagogical concern, and that the school's interest in disassociating itself from religious organizations and the endorsement of religious views within that environment is a legitimate one. In addition, the court recognizes a legitimate pedagogical interest in avoiding disruption from religious

debate on the walls of the school, which could be disruptive to the learning environment and and distract the school from its education al mission - concerns expressed by Principal Harris in defending his decision to control the religious content of the murals.

Other court have recognized these goals as legitimate interest which justify restrictions against public posting of religious speech on school property. *See Fleming v. Jefferson County School District*, 298 F.3d 918 (10th Cir. 2002), *cert. den.*, ---U.S.---, 123 S. Ct. 893 (2003)(tile painting and installation project established by district as part of school reconstruction after Columbine shootings constituted school sponsored speech over which school retained editorial control); *DiLoreto v Downey Unified School District Board of Education*, 196 F.3d 958 (9th Cir.1999), *cert. den.* 529 U.S. 1067 (2000)(district's desire to avoid "controversy and distraction created by political and religious messages on high school baseball field fence was reasonable where students were captive audience at school sponsored events). *Cf. Gernetzke v Kenosha Unified School District No. 1*, 274 F.3d 464 (7th Cir. 2001), *cert. den.* 535 U.S. 1017, 122 S. Ct. 1606, 152 L. Ed. 620 (2002)(school principal's decision to forbid display of cross in mural painted by school bible club insulated from liability under Equal Access Act).

This court similarly concludes that the Boca High principal's restriction over religious symbolism in the mural project was reasonably related to the District's legitimate goal of preventing disruptive religious debate in the school corridors, and therefore constitutes a permissible restriction over the content of school sponsored speech.

It is accordingly

ORDERED and ADJUDGED:

1. The defendants' motion for summary judgment on the plaintiff's First Amendment claims for money damages [DE#35] is **GRANTED.**

2. The plaintiff's corresponding First Amendment claims for injunctive and declaratory relief are **DISMISSED** as **MOOT.**

3. Pursuant to stipulation of the parties, the unrelated claims on behalf of Shelda Harris Bannon, on behalf of her daughter Brittni Harris are **DISMISSED WITH PREJUDICE.**

4. There being nothing further for the court to do in this matter, the Clerk of Court is directed to **CLOSE** this file and deny any pending motions as **MOOT.**

DONE and **SIGNED** in Chambers at West Palm Beach, Florida this 10th day of May, 2003.

Daniel T. K. Hurley
United States District Judge

cc.
Sandra Bosso-Pardo, Esq.
William O. Solms, Jr., Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 02-80438-CIV-HURLEY/LYNCH

SHELDA HARRIS BANNON, as parent and natural guardian of her daughters, SHARAH HARRIS and BRITTNI HARRIS,
Plaintiffs,

vs.
THE SCHOOL DISTRICT of PALM BEACH COUNTY, et al.,
Defendants. /

FILED BY ____ D.C.
MAY 12 2003
CLARENCE MADDOX
CLERK U.S. DIST. CT.
S.D. OF FLA.-W.P.B.

FINAL SUMMARY JUDGMENT

THIS CAUSE came on for summary judgment before the court, and the court having duly rendered its decision, in accordance with Rule 58, Federal Rules of Civil Procedure, it is herewith

ORDERED AND ADJUDGED:

That **FINAL SUMMARY JUDGMENT** be entered against the plaintiff, SHELDA HARRIS BANNON, as parent and natural guardian of her daughter, SHARAH HARRIS who shall take nothing by this action, and in favor of the defendants. The SCHOOL DISTRICT OF PALM BEACH COUNTY, and ED HARRIS, individually and in his capacity as Principal of BOCA RATON COMMUNITY HIGH

SCHOOL, who shall go hence without day. The court reserves jurisdiction to award costs.

DONE and ORDERED in Chambers in West Palm Beach, Florida this 10th day of May, 2003.

Daniel T.K. Hurley
United States District Judge